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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW RUIZ et al., Defendant and Appellant.	H040242 (Monterey County Super. Ct. No. SS092453 A & B)

On January 2, 2013, a jury convicted Matthew Ruiz and Albert Hernandez of two counts of murder by means of lying in wait (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15)[1], count 1 victim Ociel[2] and count 2 victim Rodolfo), and two counts of attempted premeditated murder (§§ 664, 187, subd. (a), count 3 victim Juan and count 4 victim Christian). As to counts 1 and 2, the jury found true the allegations that Ruiz and Hernandez were principals in the crimes and that a principal in the crimes personally and intentionally discharged a firearm causing great bodily injury or death to Ociel and Rodolfo; that appellants intentionally killed the victims while active participants in a criminal street gang (§ 190.2, subd. (a)(22); and that the murders and the attempted murders were committed to benefit the gang (§ 186.22, subd. (b)(1).)

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Throughout the trial the victims and many of the witnesses were referred to by their first names only. We do the same to protect their anonymity.

On October 4, 2013, the court sentenced both Ruiz and Hernandez to 80 years to life in state prison. The court imposed concurrent 50-years-to-life terms on counts 1 and 2 (25 to life for first degree murder plus 25 years to life for the vicarious use of a firearm) plus consecutive terms of 15 years to life for counts 3 and 4 (attempted murder with a gang enhancement). After careful consideration, the court decided against imposing a term of life without the possibility of parole (LWOP).

Both Ruiz and Hernandez filed a timely notice of appeal.

On appeal, Ruiz contends that the trial court erred in admitting evidence from his jail classification questionnaire regarding his gang affiliation because the evidence was introduced in violation of *Miranda*;[3] that the court erred in admitting evidence of a gun found in the search of his home and the photograph of a gun found in a car in which he was travelling because neither gun was connected to the crimes; that the court erred in admitting evidence of statements that he and Hernandez made while in the back of a police car; that his sentence of 80 years to life constitutes cruel and unusual punishment in violation of the Eighth Amendment; and finally that the cumulative effect of all the aforementioned errors deprived him of a fair trial.[4]

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] Ruiz states that he "hereby joins in and adopts by reference all arguments raised by [Hernandez] that may accrue to his benefit." Ruiz makes no substantive argument or identifies which of Hernandez's arguments might accrue to his benefit. Although joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), each appellant has the burden of demonstrating error and prejudice. (*People v. Coley* (1997) 52 Cal.App.4th 964, 972; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice].) An appellant cannot rely solely on a co-appellant's arguments and reasoning to satisfy his or her own burden on appeal. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) To the extent Ruiz has not satisfied his burden on appeal, we consider a given issue only as to the defendant who raised it. (*Ibid*.)

In his appeal, Hernandez contends that the prosecutor committed misconduct when he argued that a videotape showed that he, Hernandez, had a handgun in his sweatshirt pocket since the trial court had ruled that there was insufficient evidence to make such a contention; that the trial court erred in admitting evidence from his jail classification questionnaire regarding his gang affiliation because the evidence was introduced in violation of *Miranda*; that the 80-years-to-life sentence he received is cruel and unusual punishment under the Eighth Amendment and California Constitution; and finally, that his convictions should be reversed for cumulative error. For reasons that follow we affirm Ruiz's and Hernandez's convictions.

Evidence Adduced at Trial

On October 14, 2009, at approximately 4:30 p.m., 16-year-old Edgar and his cousin Alejandro, who at the time was 23 years old, walked to the "One-Two-Seven Market" (hereafter the market) to buy groceries for their grandmother. At trial, Edgar denied being a Sureño, but did admit that he associated with them. Alejandro admitted associating with Sureños and said that he had been shot at three different times. Just after Edgar and Alejandro entered the market, two people they did not know came into the market. One of the people wore a hat. After Alejandro bought the groceries, he and Edgar left the store and began to walk home. The two people from the store followed them and asked if they "banged." Edgar said he was a Sureño and Alejandro said he was a "South Sider." The two people claimed that they were "Southerners."

At some point as they were walking on Elkington Street, a grey Honda sedan pulled up next to Edgar, Alejandro, and the two people from the store. Edgar knew the driver, Juan, and his two backseat passengers, Ociel and Rodolfo. Alejandro knew one of the backseat passengers as "Moskua" and knew Ociel as "Tweak." The occupants of the Honda said they had just been in a fight with some Norteños; and they had found some Northerners at La Paz Park. They invited Edgar and Alejandro to join them to get revenge. Edgar said he could not go because he had to take the groceries back to his

grandmother. The two people from the store volunteered to go with the occupants of the Honda. They got into the car.

Juan testified that on October 14, 2009, he was approximately 16 years old. Juan did not have a driver's license, but around 2:00 or 3:00 p.m. on October 14, he took his father's Honda to pick up three friends—Christian, Ociel, and Rodolfo. Christian, who was 15 years old in October 2009, testified that he had been associating with Sureños for approximately two years. On October 14, he sat in the front seat of the Honda and Ociel and Rodolfo sat in the back.

Juan said that he drove to Elkington Street to pick up a friend, but his friend was not at home. While he was driving on Elkington, Juan saw his friend Alejandro with Edgar[5] and two other people. Juan stopped the car and someone mentioned to Alejandro and the others that they were going to fight Norteños. Christian invited Edgar and Alejandro to join them but they said no. Instead, the two other people said they were Vagos members, a Sureño gang; they got into the car. One of the people was wearing a black hat with a yellow colored letter "P" and black and white baseball gloves. According to Christian, many Sureños wear Pittsburgh Pirates hats.

Juan drove the group back to the park to confront the Norteños they had seen earlier. They saw a group of approximately eight people at the park; Juan and his friends thought they were Norteños. Everyone got out of the Honda. The two strangers walked ahead and approached the group. They pushed the suspected Norteños, who left immediately. Everyone returned to the Honda. The two strangers sat in the back behind the driver's seat. The one with the hat sat by the door and the one without the hat sat to his right next to Ociel. Juan drove and Christian sat in the front passenger seat. Rodolfo sat on the floor behind Christian.

[5] Alejandro thought Edgar was Alejandro's brother.

Eventually, after driving around looking for Norteños unsuccessfully, one of the strangers directed Christian to go to Archer Street because that was where he lived. Christian told Juan to drive to Archer Street, which he did; he parked near some apartments. After parking the car, Juan looked in his rearview mirror and saw a gun pointed at his head. Juan testified that he could not see who was holding the gun, but conceded that after the incident he had told an officer that the person with the hat shot him; and this person was wearing gloves. Juan explained that he said it was the person with the hat because the person with the hat was seated closest to him. Juan heard one gunshot and lost consciousness; he had been shot in the head. Juan was in the hospital for five to seven days. As a result of the gunshot wound he lost some hearing in his right ear. The parties stipulated that Juan suffered a gunshot wound to the head with a hemorrhagic contusion of the right temporal lobe.

Christian testified that as Juan stopped the car on Archer Street, one of the guys said, "Do you want to see my gun?" Then, he heard gunshots and "the one without the hat" shot him in the neck. Christian said that he did not hear any gunshots after he was shot. As a result of the gunshot wound Christian is paralyzed from the neck down. Both Ociel and Rodolfo were shot multiple times; both died.

On October 29, the police showed Edgar and Alejandro photographic lineups. Edgar identified Hernandez's photograph as depicting one of the two people from the market. Alejandro identified Ruiz's photograph as depicting the person wearing the hat. Alejandro described Hernandez as the one who "hit him up." At trial, Alejandro identified Ruiz as the person with the hat and Hernandez as the other person. The person with the hat said his name was "Slow Poke" and that he was from the Vagos gang.

At trial, Edgar and Alejandro identified Ruiz as the person who had been wearing the hat and Hernandez as the other person. Similarly, in court, Juan identified Ruiz and

Hernandez as the two people that got into the Honda; he identified Ruiz as the one that was wearing the hat.[6] Alejandro testified that one of the people from the market was wearing a glove on his left hand.

Robert, who worked as a communications training officer for the Presidio of Monterey Police was driving on Archer Street when he noticed a grey Honda sedan driving slowly and abruptly stopping and moving again. Robert saw two or three bright flashes of light and heard muffled gunshots. The Honda lurched forward. Robert saw two people get out of the Honda. Both appeared to be 20 to 25 years old. The first person wore a dark baseball cap that was turned backward and he held his hands inside the pocket of a dark "hoodie" he was wearing. The second person was not wearing anything on his head. This person ran into the first person and pushed him; they both stumbled, but caught their balance. They ran into a nearby alley. Robert telephoned 911.[7]

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[6] Approximately two weeks after the shooting, Salinas Police Officer Goodwin showed Juan a photographic lineup that included Hernandez's photograph. Juan's eyes grew wide and his body grew tense when he saw Hernandez's photograph. However, Juan stated that the person in the photograph looked similar to one of the two people, but was not one of them. Officer Goodwin visited Christian at the hospital and showed him two photographic lineups. Christian identified Ruiz as the person with the hat who got into the Honda. Christian identified Hernandez as the person who shot him. Christian told Officer Goodwin that he only saw Hernandez with a gun and that the gun was black and grey. Christian told him that he was the first person shot and after he was shot he heard more shots. Christian confirmed that Ruiz sat behind Juan in the Honda.

[7] In court, Robert identified Ruiz and Hernandez, but thought that Hernandez was the one wearing the hat and Ruiz was the second man to get out of the Honda. On October 29, when Officer Goodwin showed Robert a photographic lineup that included Hernandez's photograph, initially, Robert set aside Hernandez's photograph and selected someone else as one of the suspects. However, when another officer showed Robert a photographic lineup that included a photograph of Ruiz, initially, Robert set aside the photograph with all the others, but after going through the photographs a second time he pulled out Ruiz's photograph and said that if the man was wearing a baseball hat backward then it would be the man he saw get out of the Honda first. Salinas Police Officer Kim Robinson confirmed that when she spoke to Robert at the scene, he told her (continued)

Various witnesses testified that they saw two people running through backyards and going over fences. According to one witness, both people wore black hooded sweatshirts and one wore a black baseball hat with a gold emblem. Momentarily, one of the people stopped as if he had dropped something or was looking for something before he jumped over a fence. Another witness discovered a black baseball cap and gloves in his yard after the men ran through. Two of the witnesses thought that the people were in their 20's.[8]

Salinas Police Officer Richard Diaz[9] arrived on Archer Street to see a Honda sedan parked by a fallen tree branch. All four doors to the Honda were open. Officer Diaz asked the driver (Juan) who shot him, but Juan responded that he did not know and that he did not speak English. Officer Diaz found Rodolfo in the back of the Honda lying across the floor with a gunshot wound to his head; part of Rodolfo's brain was exposed. Ociel was in the back on the seat; he had suffered a gunshot wound to his head; he was unconscious and barely breathing. Christian was in the front seat and had suffered a wound to the left side of his neck—he too was unconscious and barely breathing.

From the backyard of 791 Archer Street, officers recovered a black baseball cap with the letter "P" on it along with a pair of black and white gloves.

On October 16, 2009, forensic pathologist Dr. John Hain performed the autopsy of 14-year-old Rodolfo. Rodolfo was five feet tall and weighed 93 pounds. Dr. Hain

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he had witnessed the shooting; that he heard several muffled pops that sounded similar to gunfire; that the front and rear driver's doors opened and two men got out of the rear of the Honda; that the second man to get out pushed the first; that Robert described the men as 20 to 25 years old; that one had curly black hair and wore a black sweatshirt and a black and white baseball cap; that the other was a heavier build with a shaved head; and both kept one hand inside their sweatshirts as if they were trying to conceal something.

8 At the time of the shooting Ruiz was 17 years, 8 months old and Hernandez was 7 days away from his 17th birthday.

9 All further references to officers in this case are to Salinas Police Department officers unless noted otherwise.

opined that the cause of Rodolfo's death was two gunshot wounds to the head. Based on the gunshot residue on Rodolfo's hood, Dr. Hain concluded that Rodolfo had been shot twice in the head from less than one foot away. Two bullets entered his upper left forehead just inside the hairline. One bullet passed through his skull and his brain. It was recovered from his pharynx area. The second bullet was recovered from Rodolfo's stomach, which meant that Rodolfo had swallowed it. The bullets that were recovered were partially fragmented. Rodolfo was shot from above and to the left of his head. Rodolfo had gun powder burns on the back of his hand. Rodolfo had a tattoo of three dots on his elbow.

Dr. Hain's autopsy of 14-year-old Ociel revealed that he was five feet three and a half inches tall and weighed 156 pounds. The cause of his death was multiple gunshot wounds. Ociel had been seated in the right side of the back seat when he was shot three or four times. One bullet entered the scalp area of the top of his head; one entered the center of his head; one bullet entered his left earlobe and passed through his ear, leaving shrapnel wounds on his left cheek; and one bullet entered and exited his left shoulder. Based on the gunpowder stippling and burns to Ociel's left shoulder, Dr. Hain concluded that Ociel had been shot in the shoulder from inches away. There were plastic and copper jackets in the wound tracks. Dr. Hain recovered bullet fragments from Ociel's body. Dr. Hain located plastic material in a track wound, which he said "most likely" came from a hollow point bullet. Ociel had gunpowder burns on his right thumb. Dr. Hain recovered a .38-caliber bullet slug from the right thumb. Ociel had gunpowder stippling along his wrist. The gun had been fired within six inches of Ociel. The bullet fragments removed from Rodolfo and Ociel were jacketed.

Five .380-caliber shell casings were located at the scene.[10] Criminalist Sara Yoshida examined the shell casings and determined that they were .380-caliber and that

[10] The prosecutor referred to a sixth casing found at the scene, but Officer Rios (continued)

they had all been fired from the same semi-automatic firearm. However, she testified that it was not possible to reach a conclusion about some bullet fragments that she had received. She was able to determine that all the bullets and fragments she was able to examine were called "Pow'rBall", which meant that there was a small plastic ball inside. Yoshida explained that no manufacturer made copper-jacketed bullets or Pow'rBall bullets capable of being fired from a .38-caliber Smith and Wesson revolver. Yoshida did not examine the bullet from Juan's wound and she did not examine the bullet from Christian.

In 2009, Officer Brian Canaday[11] reviewed surveillance video from the market and saw one of the two suspects holding a bag of chips. Officer Ruben Sanchez, a school resource officer, recognized Hernandez from the video, as did Monterey County Probation Officer (P.O.) Derek Rager, who had supervised Hernandez.

Initially, officers recovered clothing from the Honda and two cellular telephones, both of which had blue wallpaper associated with Sureños. A second search of the Honda revealed a chip bag on the floorboard. Officer Canaday asked then Officer Brian Johnson to process the bag for fingerprints.[12] Using the fuming process, Officer Johnson was able to lift a latent fingerprint from the bag. The hat with the letter "P" was processed; it had a low-quality fingerprint.

Latent fingerprint examiner Gayle Graves examined the print from the chip bag. She compared the print to a print from Hernandez's right thumb. Using eight points of comparison, she concluded that the print on the chip bag came from Hernandez.

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corrected the prosecutor, telling him that the casing corresponded to the sixth placard placed at the scene.

11 At the time of trial, Officer Canaday worked in the Kern County District Attorney's Office. In 2009, he was a detective in the Salinas Police Department.

12 At the time of trial Officer Johnson was a detective.

Senior criminalist Christopher Tanforan examined the baseball cap and gloves recovered from behind the Archer Street apartment complex. The DNA from three to five people was present on the gloves' interior, but Ruiz was the major contributor.

When Ruiz and Hernandez were arrested, officers seized their cellular telephones. Wireless expert Jim Cook evaluated the cellular telephone records for the two phones and determined that Ruiz's telephone and Hernandez's telephone[13] had exchanged calls and texts on October 14. Cook concluded that the cellular telephone activity showed that Ruiz's telephone went from 225 Maryal in Salinas to the market, then to 777 Archer Street at 5:37 p.m. on October 14.

On the day of their arrest, Ruiz and Hernandez were placed in the same patrol car for transport to the jail. Their conversation was recorded. Officer Josh Lynd explained that at times they whispered to each other. A recording of the conversation was played for the jury. Officer Lynd testified that after being put into the car, someone said, "I didn't say shit."[14] Then one of them commented, "Don't tell anybody. Don't tell your attorney. Don't tell anybody." One of them said, "Hopefully, they don't have enough evidence" and that "Hopefully we'll be out in a month or two."

Evidence of Hernandez's Gang Affiliation

Officer Cameron Murphy testified that on October 26, 2008, he contacted Hernandez. He was in the company of suspected gang members, one of whom was "wearing a gray sweatshirt with a red 831 and a Sin Cal on the front of it, along with the Northern Star shirt, red and black shorts." Hernandez admitted to being a Norteño gang member.

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[13] Mr. Cook testified about the cellular phone activity on October 14, but conceded that he could not determine who possessed the telephones on that day.

[14] Officer Lynd testified that when he listened to the recording he was not able to distinguish between the two voices.

Officer Sanchez testified that when he saw Hernandez at a high school football game a few weeks before the shooting, Hernandez had a red bandana secreted in the pocket of his pants. Officer Sanchez explained that Norteño gang members often display their affiliation with a red bandana.

On October 28, 2009, Officer Lynd executed a search warrant at Hernandez's residence. The search revealed a current identification card for Hernandez that was in a dresser in the garage. Approximately five feet away from the dresser was a pair of red tennis shoes. A T-shirt that said "Salad Bowl of America"—a slogan associated with Norteño gang membership—was located with Hernandez's things.[15]

When P.O. Rager took over supervising Hernandez's probation from Texas, Texas authorities indicated that Hernandez was affiliated with the Latin Kings. P.O. Rager testified that in February or March 2009, Hernandez told him that he associated with Norteño gang members. During his supervision of Hernandez, P.O. Rager discovered that Hernandez had an MP3 player that contained music considered to be "Norteño gang related music."

Officer Thomas Larkin interviewed Hernandez after his arrest on October 28.[16] Officer Larkin asked Hernandez about the meaning of his EM tattoo; Hernandez claimed he did not know its meaning. Officer Larkin explained to the jury that the tattoo represents "East Market"—a Salinas Norteño gang. When Officer Larkin showed Hernandez a photograph taken from the market surveillance video, Hernandez admitted that it was of him, but he would not identify the other person in the photograph.

When Hernandez was transferred from juvenile hall to the county jail, Monterey County Deputy Sheriff Rebecca Gordano interviewed Hernandez for jail classification

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15 Officer Lynd explained that the slogan "Salad Bowl of America" is significant in the gang culture in Salinas because Salinas produces a lot of lettuce; and gang members often refer to Salinas as the salad bowl.

16 Officer Larkin read Hernandez his *Miranda* rights.

purposes. Deputy Gordano asked Hernandez if he was affiliated with a gang; Hernandez said he was affiliated with the Norteños. Specifically, he said he was in the East Market set of Norteños. On the jail intake questionnaire Deputy Gordano listed Hernandez's enemies as Sureños.

When Hernandez was booked into county jail, Officer Johnson photographed a tattoo Hernandez had on his left arm. The tattoo depicted the letters "E" and "M".

Evidence of Ruiz's Gang Affiliation

On April 28, 2006, Officer Adolfo Lopez was investigating a battery report at a community school when he was given a piece of paper by a probation officer. He testified that the paper had been confiscated from Ruiz by one of the teachers. The paper contained gang writing, which Ruiz admitted he and his friends had written. The symbols were associated with Norteños. Among the writings was the number "3"; it had been crossed out and the numbers "10" and "4" were below it. Officer Lopez asked Ruiz if he was associated with a gang. Initially, Ruiz said no, but when Officer Lopez asked Ruiz if it would be okay for him to be lodged with Southerners at juvenile hall, Ruiz said no. Ruiz explained that Southerners disrespect Northerners.

On September 30, 2008, Officer Jeff Alford stopped a car being driven by Ruiz's mother. Ruiz was sitting in the front passenger seat. Officer Alford asked Ruiz to get out of the car. Officer Alford testified that he recognized other people in the car as Norteño gang members. One of them, Lachuga, tried to run when Officer Alford asked him to get out of the car; he was found to have a handgun in his pocket. When the officer searched the car, he found a .22-caliber handgun under the front passenger seat where Ruiz had been sitting. Officer Danny Warner placed Ruiz in the back seat of a patrol car. The officer remained with Ruiz while Ruiz was in the car. At one point another officer came over to tell Officer Warner that two guns had been located and that one was found underneath the front passenger seat. Ruiz said, "That's mine."

A photograph taken of Ruiz on September 30, 2008, showed that Ruiz had a tattoo of the name "Valerie" on his arm. Valerie is his mother's name. Ruiz had a tattoo of "Ruiz" on the back of his neck. Officer Alford could not recall Ruiz having any other tattoos at that time.

On October 29, 2009, Officer Arlene Currier searched Ruiz's residence. A search of a bedroom that had letters addressed to Ruiz in a dresser yielded a banner with San Francisco 49ers on it, a wood block with "500 block" engraved on it, Reebok shoes and baseball hats, a black T-shirt and black hoodies, a black T-shirt with a gang slogan, and photographs of Ruiz with known gang members and people flashing gang signs. A loaded revolver was found in his dresser drawer.

During his jail intake interview, Ruiz told Monterey County Sheriff's Deputy Reed Fisher that he was affiliated with the Norteños. According to Deputy Fisher, Ruiz indicated that his opposition gang was the Sureño gang.

Gang Expert Testimony

Officer Masahiro Yoneda, a Violence Suppression Unit Gang Intelligence Officer, testified as an expert on gang activity in the City of Salinas. Officer Yoneda explained that the Norteños and the Sureños are rivals that commit violent acts against each other. Each gang has between 1,500 and 2000 members in the Salinas area. The Norteños identify with the number 14, the North Star, San Francisco Giants clothing, San Francisco 49ers clothing, and the color red. The Salinas East Market gang uses the letters SEM and the number 500, which represents the 500 block of East Market Steet—viewed by members as the birthplace of the gang. Sureños identify with the number 13, the Los Angeles Dodgers, "Southpole gear" and the color blue. Officer Yoneda explained that a gang member receives greater respect from within the gang the longer he is a member and the more serious and numerous the crimes he commits. Perceived disrespect by a rival gang member often ends up setting off a chain of events starting with either a

violent assault or a shooting or homicide; the gang that receives that violent act then has to retaliate.

Officer Yoneda opined that Hernandez was an active member of the Norteño gang on October 14, 2009. He based his opinion on numerous factors, including Hernandez's prior contacts with Salinas police officers;[17] the jail intake screening questionnaire; information he gained from P.O. Rager that when Hernandez returned from Texas Hernandez told him that he would associate with Norteños; conversations he had with Navaho, Texas Police Officer Wayne Valdez, who told him that the Latin Kings in Navaho are rivals of Sureños; numerous items of gang paraphernalia recovered from Hernandez's residence, including a red shirt with a star and outline of California and a shirt with a salad bowl; and Hernandez's tattoo before the shooting and tattoos he acquired between the shooting and September 6, 2012.[18]

Officer Yoneda opined that Ruiz was an active Norteño gang member at the time of the shooting. Again, he based his opinion on numerous factors, including Ruiz's contacts with the Salinas police for gang-related criminal activity; the jail intake screening questionnaire; Ruiz's association with known gang members; Ruiz's tattoo of "500" acquired after the shooting, which indicated to Officer Yoneda that Ruiz was advertising the fact that he committed a crime; other tattoos he acquired of the number 4 and XIV; the gang indicia found in Ruiz's residence including a red T-shirt with the words "Cali" and a black Huelga bird; photographs of Ruiz in which he appears to be

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17 This included Officer Murphy's contact with Hernandez where he was in the company of three suspected gang members and where he admitted he was a Norteño gang member; and Officer Sanchez's contact with Hernandez where he had a red bandana at the football game.

18 Hernandez acquired a tattoo on his abdomen of the word "Norte" in large letters. Hernandez had "side" tattooed on the side of one hand and four dots tattooed on the other hand.

"throwing an M" with his left hand; and photographs of other people in which they are throwing gang signs.

Officer Yoneda opined that if two Norteños posed as Sureños and got into a car occupied by four Sureños and they killed two of the Sureños and tried to kill the other two, the crime would have been committed for the benefit of the Norteño street gang. He explained that "it enhances the reputation of the gang when members of that gang commit violent crimes against the other gang." Previously, Officer Yoneda had not heard of a Norteño posing as a Sureño to obtain a gang advantage.[19]

The parties stipulated that the Norteños are a criminal street gang within the meaning of section 186.22, subdivision (f) in that it is an ongoing organization of three or more people; that it is both formal and informal; that one of its primary activities is the commission of criminal acts including homicides, assault with a deadly weapon, and possession of concealed firearms; that the Norteños have a common name and symbol; and that the members engage in a pattern of criminal activity.

Further, the parties stipulated that photographs of Ruiz and Hernandez taken of them in jail three years after the shooting showed new gang-related tattoos.

Discussion

Ruiz's Contentions

Evidence of Ruiz's Statements Taken during the Jail Intake Screening

Before trial, the court held an Evidence Code section 402 hearing on the admissibility of Ruiz's statements to the jail classification officer and the jail classification questionnaire. Ruiz's counsel argued unsuccessfully that the admission into evidence of Ruiz's statements would violate his privilege against self-incrimination in that his client was never given a *Miranda* advisement. As noted, Deputy Fisher testified that Ruiz admitted Norteño affiliation. The gang expert relied in part on the jail

[19] Initially, the police investigated the shooting as a Sureño-on-Sureño crime.

classification admissions and questionnaire in forming his opinion that Ruiz was a Norteño gang member.

Ruiz argues that the court erred in admitting the statements taken during the jail classification process as they were taken in violation of *Miranda*, *supra*, 384 U.S. 436.

Recently, in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), the California Supreme Court agreed with Ruiz's position. The court held that classification interviews that take place while a defendant is booked into jail constitute custodial interrogation for purposes of *Miranda*. (*Id*. at p.527, 530-540.)[20] The Supreme Court explained that "Gang affiliation questions do not conform to the narrow exception contemplated in [*Rhode Island v*.] *Innis* [(1980) 446 U.S. 291] and [*Pennsylvania v*.] *Muniz* [(1990) 496 U.S. 582] for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' [Citation.]" (*Id*. at p. 538.) Further, the court held that a defendant's un-*Mirandized* responses to questions about gang affiliation during a classification interview are not within the public safety exception to the definition of custodial interrogation under *Miranda*. (*Id*. at pp. 540-541.) The Supreme Court explained, "Without minimizing the serious safety concerns confronted in jails and prisons, we conclude that the legitimate need to ascertain gang affiliation is not akin to the imminent danger posed by an unsecured weapon that prompted the [*New York v*.] *Quarles* [(1984) 467 U.S. 649] court to adopt a public safety exception to the requirement of *Miranda* admonitions." (*Id*. at at p. 541.)

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[20] The court disapproved *People v. Gomez* (2011) 192 Cal.App.4th 609, which had held that un-admonished answers to questions elicited during the booking process were admissible pursuant to the booking question exception to *Miranda*. (*Id*. at p. 635.)

Finally, the court concluded, "To be clear, it is permissible to *ask* arrestees questions about gang affiliation during the booking process. Jail officials have an important institutional interest in minimizing the potential for violence within the jail population and particularly among rival gangs, which ' "spawn a climate of tension, violence and coercion." [Citation.]' [Citation.] To that end, they retain substantial discretion to devise reasonable solutions to the security problems they face. [Citation.] We simply hold that defendant's answers to the unadmonished gang questions posed here were inadmissible in the prosecution's case-in-chief. [Citation.]" (*Elizalde, supra,* 61 Cal.4th at p. 541.)

"The erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. [Citations.] That test requires the People here 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.]" (*Elizalde*, *supra*, 61 Cal.4th at p. 542.)

Ruiz argues that his admissions were essential to the prosecution's case to prove not only the gang allegations, but also to the entirety of the prosecution case.

The prosecution has satisfied its burden in this case of proving beyond a reasonable doubt that the error did not contribute to the verdict.

Ruiz's gang membership was convincingly established by other evidence, including Ruiz's contacts with the Salinas police for gang-related criminal activity; Ruiz's association with known gang members; the gang indicia found in Ruiz's residence, including a red T-shirt with the words "Cali" and a black Huelga bird, the wood block with "500 block" engraved on it, and photographs of Ruiz in which he appears to be "throwing an M" with his left hand; and photographs of other people in which they are throwing gang signs, which were found in his room.

This evidence is sufficient to support a finding that Ruiz was a Norteño gang member when the crimes in this case were committed.[21] When considered with the aforementioned evidence, Ruiz's acquisition of gang-related tattoos after the crimes were committed and while he was incarcerated provided additional evidence of his gang affiliation. (*People v. Romero* (2008) 44 Cal.4th 386, 412.)

Since Ruiz's gang affiliation was amply established by independent and un-contradicted evidence, the erroneous admission of his un-*Mirandized* statements was harmless beyond a reasonable doubt.

Admission of Gun Evidence

During the trial, Ruiz moved to exclude evidence of a revolver found in his home and evidence of a firearm found during a car stop that happened in 2008 where he was the front seat passenger. Counsel for Ruiz argued that the revolver found in Ruiz's house could not have produced any of the ballistics evidence that was recovered from the scene of the shooting. Further, in the absence of any link between that revolver and the shooting, the evidence would prove far more prejudicial than probative. As to the firearm found in the car, counsel argued that it was cumulative of other evidence associating Ruiz with a gang and that therefore its probative value was very low. The prosecutor argued that although the revolver found in Ruiz's home was not the weapon used to kill Ociel and Rodolfo, the evidence was relevant because of the possibility that a second firearm was used to injure either Juan or Christian. After hearing Juan's and Christian's testimony in the case, testimony from the ballistics expert, and testimony from the forensic pathologist, the court ruled that the evidence of the revolver found in Ruiz's home was admissible. The court found that the prosecution had made a "reasonable

[21] Ruiz's counsel acknowledged in closing argument the overwhelming evidence of his client's gang involvement. Specifically, he told the jury, "To say that Matt Ruiz is not involved or associated with a gang, I would be run out of the courtroom if I said that here. It is obvious as he sits there. It just is."

showing" that "the revolver was used in the crimes . . . at least in the injuries inflicted" on Juan. As to admitting a photograph of the firearm found in the 2008 car stop, the court found it relevant to establish Ruiz's gang connections and went directly to one of the elements that the prosecution had to prove.

Ruiz contends that the trial court violated his due process rights by admitting the evidence that a revolver was found in his house and a firearm in the car in which he was travelling. He argues that the evidence was irrelevant and prejudiced the jury because it infected his trial with unfairness.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930.) " ' "Evidence is substantially more prejudicial than probative (see Evid.Code, § 352) if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." . . . "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." ' [Citation.]" (*Ibid.*)

" 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid.Code, § 210.)

Generally, "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056 [trial court erred in admitting evidence of defendant's prior possession of handgun similar to murder weapon where prosecutor did not claim such weapon was actually used in murders]; see also *People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*) [trial court erred in admitting evidence of a Colt .38-caliber revolver found in defendant's possession two weeks after murders where evidence

showed weapon actually used was a Smith and Wesson .38-caliber revolver], overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393 [trial court erred in admitting evidence of knives recovered from defendant's residence two years after murder where knives were not murder weapon and were irrelevant to show planning or availability of weapons].) In other words, "[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant. [Citations.]" (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.)

On the other hand, evidence of weapons not actually used in the commission of a crime may be admissible when they are relevant for other purposes. (*People v. Cox* (2003) 30 Cal.4th 916, 956 [when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The critical inquiry is whether the weapons evidence bears some relevance to the weapons shown to have been involved in the charged crimes, or is being admitted simply as character evidence. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1056-1057; *People v. Prince* (2007) 40 Cal.4th 1179, 1248-1249.)

As to the admission of evidence of a revolver found in Ruiz's home, the evidence presented at trial supports the inference that more than one gun was used in the shooting. Juan said Ruiz shot him, and Christian said that the person without the hat shot him; in court Christian identified Hernandez as that person. Moreover, only five shell casings were found at the scene; and the forensic evidence showed that at least seven bullets were fired and possibly eight—one that went into Juan, one that went into Christian, two that went into Rodolfo and three or possibly four that went into Ociel. The ballistics expert testified that after firing the bullets, shell casings remain within a revolver and have to be

manually extracted. The fact that only five shell casings were found at the scene and seven or eight bullets were fired leads to the conclusion that possibly a revolver was used in the shooting.

When, as here, "the specific type of weapon used to commit a homicide or [attempted homicide] is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.]" (*Riser*, *supra*, 47 Cal.2d at p. 577.) The revolver found in Ruiz's dresser drawer could have been one of the firearms used in the shooting. Accordingly, the court did not err in ruling the evidence admissible.

As to the admission into evidence of the photograph of the gun found in the 2008 traffic stop, in *People v. Smith* (2003) 30 Cal.4th 581 (*Smith*), the California Supreme Court clarified its holding in *Riser* to explain that weapons not directly used in the commission of the charged crime nonetheless may constitute relevant evidence. The defendant in *Smith* challenged the admission of a gun and ammunition belonging to him that did not match the description of the murder weapon. (*Smith*, *supra*, at p. 613.) Relying on *Riser*, the defendant contended that the admission of this evidence constituted error. (*Ibid*.) The high court rejected the argument; the court explained that the "evidence did not merely show that defendant was the sort of person who carries deadly weapons, but it was relevant to his state of mind when he shot [the victim]." (*Ibid*.)

When Ruiz's attorney sought to have the photograph of the gun found in the 2008 car stop excluded, he argued that the evidence was cumulative of other gang evidence and therefore under an Evidence Code section 352 analysis "the prejudicial effect . . . is really . . . immense when it does not have a lot of probative value . . . ." The prosecutor argued that the 2008 car stop gun evidence went to Ruiz's "knowledge of what gang activity is about, which has to be proved by the People."

Evidence Code section 352 allows for the exclusion of evidence if its probative value is substantially outweighed by the probability that its admission would cause undue prejudice, confusion or delay. This section gives the trial court broad discretion to admit or exclude evidence, and its decision to do so will not be disturbed unless it is arbitrary, capricious, or patently absurd. (*People v. Kelly* (2007) 42 Cal.4th 763, 783.)

One of the special circumstances charged in this case was that the murders were committed while Ruiz was an active participant in a criminal street gang and the murders were carried out to further activities of the gang (§ 190.2, subd. (a)(22)). In order to prove this allegation, the prosecutor had to prove that Ruiz was "an active participant in a criminal street gang" and "knew that members of the gang engage in or have engaged in criminal activity. . . ." We are not sure how Ruiz's possession of a gun is circumstantial evidence of his knowledge that *members of the gang* engage in criminal activity.

However, assuming for the sake of argument that the court erred in admitting the 2008 car stop gun evidence because it was irrelevant, we find the error harmless. Reversal is not warranted unless the evidence was prejudicial. "[S]tate law error in admitting evidence is subject to the traditional *Watson* test:[22] The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Federal due process is offended only if admission of the irrelevant evidence renders the trial fundamentally unfair. (*Ibid*.)

Although gun evidence always has the potential to prejudice the accused, gang and gun violence permeated the facts of this case. We fail to see how the introduction of this one photograph made Ruiz's trial fundamentally unfair. Ruiz argues that the evidence of his participation in the crimes was not strong. We disagree.

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[22] *People v. Watson* (1956) 46 Cal.2d 818, 836.

The evidence of Ruiz's guilt was overwhelming. In court, Juan identified Ruiz as the person in the back of the Honda who was wearing a hat; he told Officer Larkin that it was this person who shot him and that he was wearing gloves. Ruiz's DNA was found in the glove discarded after the shooting. Robert identified Ruiz as the person who was wearing the hat that got out of the back of the Honda after the shooting. The surveillance video from the market confirmed Ruiz's identity. Alejandro identified Ruiz's photograph as depicting the person wearing the hat that was in the market and he identified him in court as the person wearing the hat.[23] The hat Ruiz was seen wearing in the market video was recovered from an Archer Street backyard.

In short, the physical evidence and eyewitness identifications provided overwhelming evidence of Ruiz's guilt. Thus, we see no reasonable probability that the verdicts would have been more favorable to Ruiz absent this assumed error.

Statements Made While Ruiz and Hernandez Were in the Back of a Patrol Car

Officer Lynd took Ruiz and Hernandez to jail. As noted, Officer Lynd testified that he placed a recording device in the back seat of the patrol car and after reviewing the transcript of the recording he was able to identify certain things that he felt were significant to the case. When the prosecutor asked Officer Lynd if he could say what exactly it was that he heard that he felt was significant, Ruiz's counsel objected to the form of the question on the ground that it called for speculation. The court overruled the objection. The court allowed Officer Lynd to identify the portions of the transcript that he felt were significant. In so doing, Officer Lynd said, "you can hear one of them say, I didn't say shit." Counsel for Ruiz objected on the ground that it was hearsay. Officer Lynd testified to what was said as noted *ante*.

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[23] Ruiz contends that although Alejandro identified him and Hernandez, he was confused as he identified each of them as the one with the hat. The record does not support Ruiz's contention.

Ruiz contends that the trial court violated his due process rights since the statements were neither admissions nor adoptive admissions. As such they were inadmissible. It does appear that the prosecution sought to have the statements admitted under Evidence Code section 1220.

Evidence Code section 1220 provides in part: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity . . . ."

"The statement of a party is the most straightforward of the hearsay exceptions. Simply stated, and as a general rule, if a party to a proceeding has made an out-of-court statement that is relevant and not excludable under Evidence Code section 352, the statement is admissible against *that* party declarant." (*People v. Castille* (2005) 129 Cal.App.4th 863, 875-876 (*Castille*), italics added.) "The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for *admissions* of a party. However, Evidence Code section 1220 covers all *statements* of a party, whether or not they might otherwise be characterized as admissions. [Citations.]" (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5.)

The problem in this case is Officer Lynd had no idea who made which statement. Thus, without knowing who made each statement it cannot be admissible against *that* party declarant. Under Evidence Code section 1220 a statement of a party is admissible only against the party who actually made it. (See *Castille*, *supra*, 108 Cal.App.4th at pp. 875-876 [the hearsay exception under Evidence Code section 1220 contains two important limitations, one of which is that it is admissible only against the party who actually made it].) It is conceivable that Ruiz made all the statements or Hernandez made all the statements, or Ruiz made some and Hernandez made others.

Nevertheless, we reiterate that "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida*, *supra*, 37 Cal.4th at p. 439.) Absent fundamental unfairness,

state law error in admitting evidence is subject to the traditional *Watson* test: "The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Ibid*.)

Even assuming error of constitutional dimension, we are convinced that the admission of the statements made while Ruiz and Hernandez were in the back of the patrol car, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24 [before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt].) " 'Under that test, "we must determine on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury,' [citation], whether [the hearsay was] sufficiently prejudicial to [defendant] as to require reversal." [Citations.]' [Citation.]" (*People v. Houston* (2005) 130 Cal.App.4th 279, 296.)

For all the same reasons noted in Ruiz's previous argument, the evidence of his guilt was overwhelming. In contrast, the evidence of the patrol car conversation was brief and equivocal on whether either defendant was acknowledging complicity in the crimes.

In short, the physical evidence and eyewitness identifications provided overwhelming evidence of Ruiz's guilt. Thus, any error was harmless beyond a reasonable doubt.

Cruel and Unusual Punishment

Ruiz argues that the sentence he received—a de facto LWOP sentence—violates the Eighth Amendment. Ruiz points out that he was a juvenile at the time of the shootings and he will not be eligible for parole until he is 97 years old, well beyond his expected life span.[24]

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[24] Ruiz asks this court to take judicial notice of the Centers for Disease Control (continued)

In order to address the issue of whether Ruiz's sentence violates the constitutional prohibitions against cruel and unusual punishment, we look to two United States Supreme Court cases and one California Supreme Court case—*Graham v. Florida* (2010) 560 U.S. 48, (*Graham*), *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*), and *Caballero, supra*, 55 Cal.4th 262, to guide our analysis.

Initially, we examine the salient United States and California Supreme Court precedents on the issue of life sentences without parole, both for juveniles convicted of nonhomicide offenses and those convicted of homicide offenses.

In *Graham, supra*, 560 U.S. 48, the defendant was convicted of armed burglary with assault or battery, and attempted armed robbery, both committed when he was 16 years old. Although initially the trial court sentenced the defendant to probation, the court later revoked his probation after he violated its terms by committing other crimes. Thereafter, the trial court imposed the maximum sentence on each count: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. (*Id*. at p. 57.) The *Graham* court explained that "[b]ecause Florida has abolished its parole system, [citation] a life sentence gives a defendant no possibility of release unless he is granted executive clemency." (*Ibid*.)

National Vital Statistics Report Vol. 62, No. 7 Jan. 6, 2014, p. 3 available on line at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf. We have done so. The report indicates that a male Hispanic who was 15 years old in 2009 could be expected to live another 59.5 years. Ruiz, who was 17 years old in 2009, might be expected to live between 59.5 and 64.3 additional years. The People argue that Ruiz's sentence of 50 years to life is not the functional equivalent of an LWOP sentence because Ruiz will be 67 when he is eligible for parole. The People forget, however, that in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the Attorney General argued the 110-year-to-life prison sentence for a minor did not violate the Eighth Amendment even though it was the "functional equivalent of a life without parole term" on grounds no individual component of the defendant's sentence by itself amounted to a life sentence. (*Caballero, supra*, at p. 271.) Our Supreme Court rejected the contention because "the purported distinction between a single sentence of life without parole and one of component parts adding up to 110 years to life is unpersuasive." (*Id*. at pp. 271-272.)

The United States Supreme Court held that " 'the task of interpreting the Eighth Amendment remains [the court's] responsibility.' " (*Graham*, *supra*, 560 U.S. at p. 67.) "The judicial exercise of independent judgment requires consideration of the culpability of the offenders . . . in light of their crimes and characteristics, along with the severity of the punishment in question." (*Ibid*.) The *Graham* court held that undoubtedly it was established that juveniles have lessened culpability compared to adult offenders. Consequently, they are less deserving of the most severe punishments. "As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of responsibility" '; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' " (*Id.* at p. 68.) The *Graham* court found it was " 'difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " (*Ibid.*) Accordingly, juvenile offenders cannot be reliably classified as among the worst offenders. (*Ibid.*)

As to the culpability of the offenders in terms of the crimes and characteristics under review, nonhomicide crimes that do not involve killing, intent to kill, or foreseeing that death could occur "are categorically less deserving of the most serious forms of punishment than are murderers." (*Graham*, *supra*, 560 U.S. at p. 69.) Some nonhomicide crimes do involve very serious harm, but such crimes are not as morally depraved as murder, because of a murder's " 'severity and irrevocability.' " (*Ibid.*) "This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' " (*Ibid.*) A juvenile offender "who did not kill or intend to kill has a twice diminished moral culpability," because of both the age of the offender and the nature of the crime. (*Ibid.*)

With respect to punishment, the *Graham* court concluded that an LWOP sentence is the second most severe penalty allowed under the law. "Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." (*Graham*, *supra*, 560 U.S. at p. 70.) The *Graham* court found the penological justifications for such a sentence lacking with respect to juvenile offenders. The objective of retribution should be directly related to personal culpability. The case for retribution is weaker with a minor as compared to an adult; it is weaker still if the minor did not commit a homicide. (*Id*. at pp. 71-72.) Further, the *Graham* court found that deterrence does not justify such a severe sentence. Juveniles are less likely to understand or to be able to take account of deterrence, because of their lack of maturity, underdeveloped sense of responsibility, and lesser ability to consider consequences. "This is particularly so when [the most severe] punishment is rarely imposed." (*Id*. at p. 72.) A third possible penological goal—incapacitation, did not justify an LWOP sentence for juvenile nonhomicide offenders. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." (*Ibid*.) The court remarked that such a judgment is questionable, even for expert psychologists, and noted that " 'incorrigibility is inconsistent with youth.' " (*Id*. at p. 73.) A penalty of life without parole "forswears altogether the rehabilitative ideal," by "denying the defendant the right to reenter the community," and making "an irrevocable judgment about [the] person's value and place in society." (*Id*. at p. 74.) An LWOP sentence for a juvenile nonhomicide offender is incompatible with rehabilitation as a penological goal. For example, LWOP prisoners are foreclosed from vocational training or other programs and rehabilitative services that are available to other prisoners. The *Graham* court concluded that an LWOP sentence, and concomitant exclusion from rehabilitative opportunities, is

inappropriate for juvenile nonhomicide offenders, in light of a juvenile's reduced culpability and capacity for change. (*Id*. at p. 74.)

In *Graham* the United States Supreme Court ruled that although a state is not required to guarantee eventual release to a juvenile nonhomicide offender, "What the State must do, however, is give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance." (*Graham*, *supra*, 560 U.S. at p. 75.) The court observed that some juvenile nonhomicide defendants might actually turn out to be incarcerated for life. "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does [forbid] States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Ibid*.) The court fashioned a categorical rule that "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, . . . it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." (*Id.* at

p. 79.) Thus, in *Graham*, the United States Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Id.* at p. 82.)

In sum, the Eighth Amendment categorically bans imposition of a sentence of life without parole on a juvenile nonhomicide offender. (*Graham*, *supra*, 560 U.S. at p. 75.)

In *Miller*, *supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2455], the United States Supreme Court addressed the imposition of LWOP terms for juveniles who were convicted of homicide offenses. The court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (*Id.* at p. __ [132 S.Ct. at p. 2460].)

The *Miller* court began with the principle that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.' " (*Miller*, *supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2464.) The *Miller* court explained that its line of precedents on that issue set out "three significant gaps between juveniles and adults. First, children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' [Citation.]" (*Ibid.*) The *Miller* court stated, "To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral

culpability and consequential harm. [Citation.] But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when [for example,] a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." (*Miller*, *supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2465].)

The *Miller* court went on to explain that sentencing schemes that mandate LWOP sentences for juveniles tried as adults "prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s . . . foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Miller*, *supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2466].)

In *Miller*, the United States Supreme Court noted that in making its categorical rule that LWOP sentences cannot be imposed upon juveniles, the *Graham* court analogized the effect of the LWOP sentence on juveniles to the death penalty. That analogous correspondence made relevant "a second line of our precedents, demanding individualized sentencing when imposing the death penalty." (*Miller*, *supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2467].) The *Miller* court found of special significance "that a sentencer have the ability to consider the 'mitigating qualities of youth.' [Citation.]" (*Ibid.*) Mandatory LWOP sentencing was flawed because it, "by [its] nature, preclude[d] a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the

accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve." (*Miller, supra*, 567 U.S. at pp.__ [132 S.Ct. at pp. 2467-2468].) The *Miller* court declined to make a categorical bar on LWOP sentences for juveniles who commit homicide crimes, but, given its relevant decisions in other cases, the court opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. at p. __ [132 S.Ct. at p. 2469].) Individualized sentencing is required when imposing the harshest penalties. In its conclusion, the *Miller* court stated that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." (*Id.* at p. __ [132 S.Ct. at p. 2475].)

In sum, *Miller* dealt with whether the Eighth Amendment allowed *mandatory* imposition of a term of life without parole on a juvenile *murderer* (*Miller, supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2489]), and held that a LWOP sentence cannot be mandatory, but such a term is permissible if the term is discretionary and the court takes into account certain relevant circumstances. (*Id.* at p. __ [132 S.Ct. at p. 2468].)[25]

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[25] The *Miller* court summarized the circumstances that a court does not consider when imposing a mandatory LWOP sentence as follows; "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and (continued)

In *Caballero, supra*, 55 Cal.4th 262, the California Supreme Court considered the sentence for a 16-year-old juvenile who had fired a gun at three members of a rival gang. Two of the victims were unhurt; the third was injured but survived. The defendant was convicted of three counts of attempted murder, plus enhancements for personal discharge of a firearm, gang enhancements, and a great bodily injury enhancement as to one victim. He received a sentence of 15 years to life for the first attempted murder, plus 25 years to life for the firearm enhancement. He was sentenced to a consecutive term of 15 years to life for the second attempted murder count, plus 20 years for the firearm enhancement. He was sentenced to another consecutive term of 15 years to life on the third attempted murder count, plus 20 years for the firearm enhancement. Thus, the defendant's total term was 110 years to life. (*Id*. at p. 265.)

The California Supreme Court determined that the sentence of 110 years to life was the functional equivalent of an LWOP sentence, and was governed by *Graham*'s ban on LWOP sentences for juveniles in nonhomicide cases. (*Caballero, supra*, 55 Cal.4th at pp. 267, fn. 3, 268.) The defendant would become parole eligible only after serving 110 years according to section 3046, subdivision (b). (*Caballero, supra*, at p. 268.) The *Caballero* court explained that "*Graham*'*s* analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime."

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consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra*, 567 U.S. at p.__ [132 S.Ct. at p. 2468].)

(*Ibid*.) The Supreme Court concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham*'s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id*. at pp.268-269.) The court ordered that juvenile offenders who had received LWOP or de facto equivalent sentences for nonhomicide crimes would be eligible to petition for writs of habeas corpus, "in order to allow the [trial] court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate." (*Id*. at p. 269.)

In sum, *Caballero* applied *Graham*, and concluded that since the Eighth Amendment categorically bans a term of life without parole for a juvenile who did not commit a homicide it categorically bans the functional equivalent of a term of life without parole. (*Caballero*, *supra*, 55 cal.4th at p. 268.)

Finally, we note that in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*) a case involving life without parole for special circumstance *murder*, a homicide offense,

the California Supreme Court found that California's special circumstance law, section 190.5, subdivision (b), does not violate the Eighth Amendment because it does not impose a mandatory sentence of life without parole, neither does it create a presumption of life without parole. (*Gutierrez*, *supra*, at pp. 1360-1361.) In *Gutierrez*, the California Supreme Court examined *Miller* and stated that "[u]nder *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller*."[26] (*Id*. at p. 1379.) As *Gutierrez* explained, in a homicide case involving a juvenile offender "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' [Citation.] To be sure, not every factor will necessarily be relevant in every case. . . . But *Miller* 'require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " (*Id*. at p. 1390.)

Gutierrez, *Miller* and *Caballero* may be read to prohibit imposition of a mandatory LWOP sentence or its functional equivalent on any juvenile homicide or nonhomicide offender, without first considering the factors *Miller* found relevant to

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[26] *Gutierrez* examined the issue of how *Miller* impacted the constitutionality of section 190.5, subdivision (b), which provides that the penalty for 16-or 17-year-old juveniles who commit special circumstance murder "shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life," and which had been interpreted as creating a presumption in favor of a sentence of life without parole. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1369, quoting § 190.5. subd. (b).) *Gutierrez* concluded that the statute should not be interpreted to create a presumption of a life sentence without parole and that a sentencing court should instead conduct the analysis described in *Miller* in deciding what sentence to impose on a juvenile offender sentenced under section 190.5, subdivision (b). (*Gutierrez*, *supra*, at pp. 1360-1361.)

punishment. (See, e.g., *People v. Lewis* (2013) 222 Cal.App.4th 108, 119 [115 years to life is a de facto LWOP sentence]; *People v. Thomas* (2012) 211 Cal.App.4th 987, 1013-1016 [196-years-to-life sentence imposed on juvenile was reversed and remanded for the trial court to exercise its discretion in light of *Miller*]; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1480-1482 [remanding for resentencing in a manner consistent with *Caballero* and *Miller*, where juvenile was convicted of a homicide offense and sentenced to 100 years]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 62-68 [84-years-to-life sentence is a de facto LWOP sentence].)

Here, in sentencing Ruiz and Hernandez the court explained the rationale for the sentencing decision. Specifically, the court stated, "[S]since we are dealing with very young victims and young defendants four years ago at the time of the crimes[] that I did want to make sure that I kept that in mind as well. [¶] And I think under Miller versus Alabama . . . the determination that must be made about whether Mr. Ruiz and Mr. Hernandez will be at some point eligible for parole consideration, clearly where they are today in their lives is relevant. So I do take into account activities and conduct in the last four years. [¶] But foremost in my mind is considering the youth and ages, maturity levels of everyone involved, the four victims and the two defendants in this case. [¶] And so I did review the record in preparation for today. And I'm struck looking at . . . a photograph of Rodolfo taken at about near the time of the crimes, how young he did appear. [¶] I'm also looking at . . . a photograph of Ociel from about the time of the crimes, how young he did appear. [¶] But I also did consider . . . photographs of Mr. Hernandez at about the time of the crime. I think those were taken in October 2009. [¶] Also . . . a photograph of Mr. Ruiz as he appeared four years ago at the time of the crime. [¶] And so I have . . . all of those images really foremost in my mind when I consider the impact of the ages of the defendants and the ages of the victims in this case and how that affects our sentencing comments and decisions here today. [¶] Also . . . I listened to the entire trial . . . . [¶] And it is very clear to me and inescapable that this

was an execution. And there is no other word for it. Mr. Ruiz and Mr. Hernandez executed two young people in October 2009 and permanently injured two others. [¶] There is no getting around the planning, the sophistication."

The court went on to say, "Just looking at the trial testimony, just looking at the evidence in this case, the level of planning is surprising, shocking, callous, and an extremely significant factor in the case. [¶] As to the People's request that both defendants be sentenced without the possibility of parole, but recognizing that they would have opportunities at 15, 20, and 24, and 25 years to seek release from that situation, I don't disagree with [the prosecutor] about the unusual level of planning and callousness and close-range violence that was testified to. [¶] At the same time, I have considered the probation officer's comments and reviews about both defendants' histories up until 2009. [¶] I have considered the information filed by Ms. Chapman under seal.[27] [¶] And I am trying to balance and reconcile a lack of maturity, a lack of judgment, a lack of sophistication on the part of these defendants against the apparent sophistication that was present in the crime that they committed. [¶] And I'm trying to reconcile those two things, I ultimately do conclude that the appropriate sentencing in this case is on an indeterminant [*sic*] basis, but one which would not impose an LWOP sentence as to Counts 1 or 2. But nonetheless, that will take into account the actual conduct, the murders, the attempted murders, the use of guns, and all of the really heinous factors that were present in the defendants' behavior October 14th of 2009."

Here, the record before us demonstrates that the trial court undertook a careful review and considered the relevant circumstances of Ruiz's status as a juvenile when it sentenced him to the maximum term of imprisonment—80 years to life—by running all the sentences on each count and enhancement consecutively. Ruiz received the

[27] Hernandez's counsel filed with the court a report by Dr. Marra, who had examined Hernandez.

individualized sentencing discretion from the trial court as mandated by *Miller*. *Miller* expressly stated that a trial court in its discretion could impose such a punishment without running afoul of the Eighth Amendment. (*Miller*, *supra*, 567 U.S. at pp.__ [132 S.Ct at pp. 2469, 2471] [our decision does not categorically bar a penalty for a class of offenders or type of crime, instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty].)

Ruiz argues that because the trial court stated that it was not making a finding of "irreparable corruption", the sentence imposed is incompatible with that finding. We disagree. Although the court concluded that an LWOP sentence was inappropriate because it would mean that Ruiz would never have the possibility of parole unless he petitioned the court for recall of his sentence (§ 1170, subd. (d)(2)(A))[28], the court made that finding because of Ruiz's age at the time of the shootings and because of information contained in the probation officer's report about Ruiz's mental development. That does not mean that the court could not balance Ruiz's age and mental development against the "unusual level of planning and callousness and close-range violence" that Ruiz engaged in when he "executed two young people" and "permanently injured two others."

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[28] Subdivision (d)(2)(A)(i) of section 1170 provides "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing." In the event that the sentence is not recalled, a defendant who was under 18 years of age at the time of the offense may "submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence." (§ 1170, subd. (H).) Under the section 1170, subdivision (d)(2) scheme, the life-without-parole sentence is unaltered if the youthful offender fails to file the petition or fails to establish rehabilitation.

In sum, the trial court's exercise of discretion in sentencing fully comported with *Miller* and does not violate the Eighth Amendment prohibition against cruel and unusual punishment.

As the parties discuss, the California Legislature enacted Senate Bill No. 260, effective January 2014, which added section 3051. (Stats. 2013, ch. 312, § 4.) With certain exceptions not applicable here, section 3051 provides an opportunity for a juvenile offender to be released on parole regardless of the sentence imposed by the trial court by requiring the Board of Parole Hearings to conduct "youth offender parole hearings" on a set schedule depending on the length of the prisoner's sentence. Specifically, youth offender parole hearings are held during the 15th year of incarceration for a prisoner serving a determinate sentence (§ 3051, subd. (b)(1)), during the 20th year of incarceration for a prisoner serving a life term less than 25 years to life (§ 3051, subd. (b)(2)), and during the 25th year of incarceration for a prisoner serving a life term of 25 years to life (§ 3051, subd. (b)(3)). Currently, the question of how Senate Bill No. 260 impacts issues of cruel and unusual punishment for youth offenders is before our Supreme Court. (*In re Alatriste and In re Bonilla*, review granted Feb. 19, 2014, S214652 (*Alatriste*), S214960 (*Bonilla*).) Here, however, because we conclude that there is no Eighth Amendment infirmity in Ruiz's sentence, we need not, and do not, reach the issue of whether Senate Bill No. 260 would serve to cure an Eighth Amendment violation by requiring a parole hearing after a defendant has served 25 years in prison.

Cumulative Error

Ruiz argues that the cumulative effect of all the aforementioned errors deprived him of his constitutional right to a fair trial.

"The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.)

Under some circumstances, several errors that are each harmless on their own should be viewed as prejudicial when considered together. (*People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*).) For instance, in *Hill*, *supra*, at pages 844-847, the court concluded that the cumulative impact of constant and outrageous misconduct by the prosecutor and several legal errors occurring at trial, "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*Id.* at p. 847.)

Certainly, " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 (*Cunningham*).) However, as discussed *ante*, since we have found none of Ruiz's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdicts. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.) Simply put, since we have found no substantial error in any respect, Ruiz's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.) Ruiz was entitled to a fair trial, not a perfect one. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

Hernandez's Contentions

Alleged Prosecutorial Misconduct

Hernandez points out that the major issue in this case was whether he or Ruiz, or both of them, possessed and used handguns. Although Juan and Christian each saw a handgun there was no evidence regarding whether it was the same gun or there were two different guns.

During the trial, the court held an Evidence Code section 402 hearing (402 hearing) on testimony the prosecution proposed to elicit from Officer Canaday. Before trial, Hernandez's counsel had received a written report from Officer Canaday

setting forth his expert opinion that in reviewing the surveillance video from the market he would testify that the suspects were behaving in a pre-attack manner at the market, and that they were hiding concealed firearms.

During the 402 hearing, Officer Canaday told the court that he had training in recognizing the characteristics of an armed gunman. Officer Canaday explained that the two characteristics that he looks for are bulky clothing and clothing that can conceal a firearm. Further, since concealed firearms need to be secured and accessible, he looks for movements such as those to protect the firearm, as well as adjustment of clothing and nervousness or alertness.

The prosecutor wanted to introduce Officer Canaday's opinion that based on Hernandez's physical actions as seen in the market surveillance video Hernandez was armed. Defense counsel argued that Officer Canaday did not have the scientific knowledge necessary to opine that someone was carrying a firearm. The court concluded that Officer Canaday had sufficient training and experience to give him a level of expertise. However, the court was concerned with whether the characteristics were distinctive enough to avoid running afoul of Evidence Code section 352. Further, the court was concerned about "reliability related to false positives . . . where someone might be identified as carrying a concealed weapon and then turn out not to be carrying a concealed weapon." Ultimately, the court conducted an Evidence Code section 352 analysis and tentatively concluded based on the court's aforementioned concerns that Officer Canaday's testimony on the subject should be excluded.

It appears that portions or clips from the video and still photographs from the video were shown to the jury during Edgar's testimony and during Officer Canaday's testimony. Certainly, the video shows that Hernandez can be seen keeping his left hand in his sweatshirt pocket throughout the video. As he approached the market, he kept his left hand in the sweatshirt pocket. Inside the store he uses his right hand both to select a

bag of chips and to pay for the chips; his left hand remains in his sweatshirt pocket as he walks away.

In his argument to the jury, the prosecutor reminded the jury that the evidence is what "came from the witness stand." The prosecutor discussed the market surveillance video; he said that the defendants walked past the door, then turned and came into the store. Then, the defendants watched the "victims" and then followed them out of the store. Later, the prosecutor mentioned that Hernandez bought a bag of chips and walked out of the store and followed Edgar and Alejandro down the street. Soon after, he posited, Ruiz and Hernandez killed two people and two other people suffered serious injuries.

Ruiz's counsel argued to the jury that the theory that there was more than one gun in the car was not "provable." Counsel pointed out that all the recovered casings came from the same gun, what appeared to be a .380-caliber automatic firearm. Hernandez's counsel asked where the evidence was to show that either Ruiz or Hernandez knew one of them had a gun. Counsel argued that it was just "conjecture and speculation by the DA to put together a story, to weave it to fit the facts as he believes them to be." Later counsel argued that "[t]here is no movement by them showing that they have a gun. Further, there was "nothing to support [the] contention" that "[t]hey both know that either they both have guns or one of them has a gun and plans to shoot and kill people."

Hernandez's counsel argued that the video was important because "there is no indication that" Hernandez has "a gun." Counsel concluded that "[t]here is not one link with [Hernandez] ever being in possession or using or being around a gun."

In rebuttal, the prosecutor responded to the argument by Hernandez's counsel that there was no evidence that Hernandez had a gun, by telling the jury that they could tell from the video that Hernandez held a handgun in his left hand inside the left front pocket of his sweatshirt. Specifically, the prosecutor argued, "You know, the big thing was made with regard to the fact that there's no evidence that Mr. Hernandez actually had a

gun. [¶] Well, I believe there is evidence. And I'm going to show it to you right now. [¶] If you look at the video again of [the market] at the time that Mr. Hernandez is buying these chips—I'm going to have Detective Austen here stop it here in a second. [¶] But you see that Edgar and Alex are buying, and they're about to leave the checkout stand. [¶] And when you go into—when—when you're carrying a weapon that you're going to use in the near future, wouldn't it be logical that you would want to have some control over that, an access to that weapon? Would you want to conceal it, especially if you're in public at the time? [¶] Now, this is Mr. Hernandez approaching. So Mr. Hernandez has the chips in his . . . right hand. [¶] By the way, the fingerprint that was made was the right thumb of Mr. Hernandez. [¶] And you notice his left hand is in . . . the front of his hoodie. And if you look at this videotape, he never takes his hand out of the front of his hoodie. [¶] When he's paying for these chips, he has a dollar bill. If you'll notice when you go through this again, you'll see that he has a dollar bill in his right hand, holding the chips in his right hand, and hands the dollar bill over to the clerk, maintaining control of what I would suggest would be the gun that he's carrying inside . . . the front part of his hoodie."

Counsel for Hernandez objected to this argument. Counsel approached the bench and after an unreported side-bar conference, the court told the jury "I'll emphasize that the attorneys in their arguments are interpreting the evidence that has been received at trial. [¶] And we haven't had direct testimony on the point of weapons possession in the store. [¶] But Ms. Chapman has offered her interpretation of the evidence that we have received. [The prosecutor] is offering his interpretation of the evidence that we have received. [¶] But none of the arguments by the attorneys are evidence themselves. They're just interpreting for you and urging you to reach certain conclusions about what the facts are."

Accordingly, the prosecutor continued, "Well, it's logical to presume that if you are carrying a weapon, that you're going to keep control over it."

Hernandez contends that the prosecutor committed misconduct when he argued for a factual proposition that was not supported by the evidence. Hernandez asserts that there was no evidence supporting the prosecutor's speculative claim that he had "anything in his left front hoodie sweatshirt pocket besides his left hand." Specifically, Hernandez argues that the prosecutor committed misconduct "when he argued as fact to the jury a proposition—namely, the claim that [he] had a handgun in his left hand, inside his left front pocket—which proposition was not established by the evidence." Hernandez takes the position that in effect the prosecutor was testifying.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves" ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*Hill*, *supra*,17 Cal.4th at p. 819.)

Regarding the scope of permissible prosecutorial argument, the Supreme Court has noted that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn from that evidence. (*Hill*, *supra*, 17 Cal.4th at p. 819.) In other words, "prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

We discern no error here. The videotape, which this court has viewed, gives rise to the inference that Hernandez could have had something in the front pocket of his sweatshirt. Throughout the video, Hernandez's left hand stays in the pocket.

Furthermore, the fact that Hernandez selects a bag of chips with his right hand, then takes money from Ruiz with his right hand, and pays with his right hand, leads to inference that whatever is in the left side of Hernandez's pocket is not something that he wanted to relinquish. The prosecutor did not misstate the facts or go beyond the record. It was for the jury to decide whether in fact Hernandez had something in his pocket and if so whether that something was a gun. All the prosecutor did was to highlight the evidence in the video and offer a reasonable inference as to why Hernandez did not take his left hand from his pocket during the entire time he can be seen on the video.

Hernandez argues that because the prosecutor's statements amounted to testimony and he could not cross-examine the prosecutor, he was denied his confrontation rights under the United States Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." This right was not implicated by the prosecutor's comments during closing argument. The prosecutor was not a witness at trial and the trial court specifically instructed the jury that the statements of counsel were not evidence. Accordingly, Hernandez cannot show that the statements violated his right to confrontation.

Furthermore, the prosecutor did not address any evidence that was not already within the jury's knowledge. Nor did he attempt to introduce "junk science," as Hernandez claims. Following the section 402 hearing, the trial court excluded Officer Canaday's testimony that in his opinion Hernandez's behavior was evidence that he possessed a gun. In excluding this evidence, the court did not restrict the prosecutor's argument about reasonable inferences that could be drawn from properly admitted evidence. Nor did the court find that there was no evidence that Hernandez possessed a gun. Rather the court was concerned about the reliability of Officer Canaday's conclusions on the issue.

Finally, as noted, "the prosecution has broad discretion to state its views regarding which reasonable inferences may or may not be drawn from the evidence. [Citation.] Arguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel. [Citation.]" (*Cunningham, supra,* 25 Cal.4th at p. 1026.) Here, defense counsel argued that there was no evidence that Hernandez was armed with a gun before the shooting. The prosecutor simply pointed out to the jury that there was evidence from which they could reasonably conclude that he was. The prosecutor's argument was within the permissible limits of rebuttal to arguments made by Hernandez's counsel.

In sum, no prosecutorial misconduct occurred.

Evidence of Hernandez's Statements Taken during the Jail Intake Screening

As noted, Deputy Gordano testified that during the jail intake interview Hernandez admitted he was in the East Market set of the Norteños.

Similar to Ruiz, Hernandez argues that the court erred in admitting his statements to the jail deputy because that evidence was introduced in violation of *Miranda*. We agree. (*Elizalde*, *supra*, 61 Cal.4th at pp. 527, 530-540.)

We repeat, "[t]he erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. [Citations.] That test requires the People here 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.]" (*Elizalde*, *supra*, 61 Cal.4th at p. 542.)

Again, the prosecution has satisfied its burden in this case of proving beyond a reasonable doubt that the error did not contribute to the verdict.

Hernandez's gang membership was convincingly established by other evidence, including his admission to Officer Murphy that he was a gang member; his association with the Latin Kings in Texas; his association with other gang members; the red bandana

recovered from Hernandez at the school football game; his tattoo of EM; and the gang-related clothing recovered from his house.

Hernandez's acquisition of a gang-related tattoo of Norte "side" and four dots after the crimes were committed and while he was incarcerated provided additional evidence of his gang affiliation. (*People v. Romero, supra,* 44 Cal.4th at p. 412.)

Since Hernandez's gang affiliation was amply established by evidence other than the statements he made during his jail classification interview, any error in admitting the statements was harmless beyond a reasonable doubt.

Cruel and Unusual Punishment

Similar to Ruiz, Hernandez argues that his sentence is a de facto LWOP sentence that violates the Eighth Amendment. In sentencing, the court addressed its remarks to both Ruiz and Hernandez. Accordingly, for all the same reasons discussed *ante*, we conclude that the trial court's exercise of discretion in sentencing Hernandez fully comported with *Miller* and does not violate the Eighth Amendment prohibition against cruel and unusual punishment.

Hernandez requests a remand for resentencing so that the trial court can consider the information contained in Dr. Marra's evaluation of Hernandez's cognitive and mental development. Hernandez overlooks the fact that the court did consider the report that Hernandez's attorney had filed with the court under seal.

Finally, Hernandez urges this court to take the position that section 3051's provision for a parole board hearing after he has served 25 years is inadequate to cure any Eighth Amendment concerns.[29] Again, however, because we conclude that there is no Eighth Amendment infirmity in Hernandez's sentence, we need not, and do not, reach the

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[29] Hernandez cites a previously published case *People v. Garrett* (2014) 227 Cal.App.4th 675 (review granted September 24, 2014, S220271), which held that Senate Bill No. 260 is inadequate because it cannot substitute for a sentencing court's consideration of all individual characteristics of the offender.

issue of whether Senate Bill No. 260 would serve to cure an Eighth Amendment violation by requiring a parole hearing after a defendant has served 25 years in prison.

Cumulative Error

Hernandez argues that if this court finds that two or more of the aforementioned arguments established error or ineffective assistance of counsel, but no one error standing alone was prejudicial, the cumulative effect of such errors and/or ineffective assistance of counsel warrants reversal of his convictions.

We reiterate that " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*Cunningham*, *supra*, 25 Cal.4th 926, 1009.) The combined effects of multiple errors may indeed render a trial fundamentally unfair. (See *People v*. *Cuccia* (2002) 97 Cal.App.4th 785, 795.) However, as discussed *ante*, since we have found none of Hernandez's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v*. *Martinez*, *supra*, 31 Cal.4th at p. 704; *People v*. *Valdez*, *supra*, 32 Cal.4th at p. 128.) Simply put, since we have found no substantial error in any respect, Hernandez's claim of cumulative prejudicial error must be rejected. (*People v*. *Butler*, *supra*, 46 Cal.4th at p. 885.) Hernandez was entitled to a fair trial, not a perfect one. (*People v*. *Bradford*, *supra*, 14 Cal.4th at p. 1057.)

Disposition

The judgments are affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

_____

WALSH, J.*

The People v. Ruiz et al.
H040242

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.